



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

FREEDOM OF INFORMATION OFFICE
Washington, D.C. 20570

Date: June 17, 2011

Senator Jim DeMint
United States Senate
167 Russell Senate Office Building
Washington, D.C. 20510

Re: FOIA ID/LR-2011-0636

Dear Senator DeMint:

This is in response to your letter, dated and received in this Office on June 6, 2011, in which you request, pursuant to the Freedom of Information Act (FOIA), the following documents related to **The Boeing Company**, Case No. 19-CA-32431:

1. Copies of all documents and communications – including email, call logs, memoranda or meeting notes – to or from NLRB Board Members and staff or produced by NLRB Board Members and staff regarding the impact on employment in South Carolina.
2. Copies of all documents and communications – including email, call logs, memoranda or meeting notes – to or from NLRB Board Members and staff and individuals working within the Executive Office of the President or any federal agency concerning the operations or activities of the Boeing Company since January 20, 2009.
3. Copies of all documents and communications – including email, call logs, memoranda or meeting notes – to or from NLRB Board Members and staff and any Member of the International Association of Machinists or their representatives concerning the operations or activities of the Boeing Company since January 20, 2009.
4. Copies of all documents and communications – including email, call logs, memoranda or meeting notes – to or from NLRB Board Members and staff and any government employee in the State of Washington or Oregon concerning the operations or activities of the Boeing Company since January 20, 2009.
5. Copies of all documents and communications – including email, call logs, memoranda or meeting notes – to or from NLRB Board Members and Staff and any Member of Congress concerning the operations or activities of the Boeing Company since January 20, 2009.
6. Copies of any documents generated by NLRB Board members, staff, or any outside consultants analyzing the legal authority of the NLRB to issue the

Complaint and Notice of Hearing in Case 19-CA-32431 involving the Boeing Company.

7. Copies of any documents generated by NLRB Board members, staff, or any outside consultants used to support the filing of the Complaint and Notice of Hearing in Case 19-CA-32431 involving the Boeing Company.

Your request for expedited treatment is granted.

I am interpreting your request to apply to both the Board-side and the General Counsel-side of the National Labor Relations Board. I have been advised by the Board-side that, after conducting a thorough search of the Board-side offices, there are no responsive documents to your request emanating from the Board-side.

Regarding documents emanating from the General Counsel-side, after conducting a thorough search of our Agency's Office of the General Counsel, the Division of Operations Management, the Division of Advice, and Region 19, your request for documents as detailed in Items # 1-4 and 6-7 is denied. To the extent that any documents responsive to your request may exist, they are privileged from disclosure pursuant to FOIA Exemptions 5 and 7(A), as explained below.

The requested documents are privileged from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), since they are intra-agency memoranda or documents which would not be available by law to a party other than an agency in litigation with this Agency. The legislative history of Exemption 5 makes it clear that this subsection of the Freedom of Information Act was designed to protect and promote the objectives of fostering frank deliberation and consultation within the Agency in the policy-making stage, and to prevent a premature disclosure of policy which could disrupt agency procedure. Thus, Exemption 5 is based upon and preserves the privilege against disclosure of intra-agency and inter-agency memoranda and documents reflecting the deliberative and consultative process so that communications between those involved in the process might be uninhibited. These documents reflect the views of the General Counsel and his staff concerning prosecutorial policies in the processing of unfair labor practice cases. Since they discuss strengths and weaknesses of the evidence, analyze various legal theories, and suggest litigation strategies and settlement possibilities, such documents clearly reflect the deliberative and consultative process of the Agency which Exemption 5 protects from forced disclosure. *N.L.R.B. v. Sears, Roebuck and Co.*, 421 U.S. 132 (1975).

This exemption was intended to encompass all documents "normally privileged in the civil discovery process," *Sears*, 421 U.S. at 148-149 (1975); *FTC v. Grolier*, 462 U.S. 19, 20, 26 (1983); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); and it incorporates the attorney work-product privilege. *Sears*, 421 U.S. at 154. The attorney work-product privilege protects documents and other memoranda that reveal an attorney's mental impressions and legal theories and that were prepared by

an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See **United States v. Nobles**, 422 U.S. 225, 239 n. 13 (1975); **Hickman v. Taylor**, 329 U.S. 495, 509-510 (1947). Additionally, the protection provided by Exemption 5 of the FOIA for attorney work-product material is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See **FTC v. Grolier, Inc.**, 462 U.S. 19, 28 (1983). Further, the protection against disclosure of work-product documents extends even after litigation is terminated and the case for which they were created is closed. *Id.* The information you seek here contains an evaluation and analysis of the critical facts and legal theories governing the case and other similar matters, thereby falling squarely within the protection of Exemption 5's attorney work-product privilege.

Moreover, because the underlying case is still open, the requested documents are privileged from disclosure under Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A), since they are part of the investigatory record compiled for law enforcement purposes, the disclosure of which could reasonably be expected to interfere with enforcement proceedings. Making such documents available upon request would have the effect of restricting communication within the Agency, and prematurely disclosing attorney work product and analysis. Since proper enforcement of the labor laws administered by this Agency depends to a great extent upon free and frank communication within the Agency, preserving the integrity of this intra-agency communication is a necessary aspect of the Board's enforcement responsibility. See, **Wellman Industries, Inc. v. N.L.R.B.**, 490 F.2d 427 (4th Cir. 1974), cert. denied 419 U.S. 834 (1974).

In response to Item # 5 of your request, I am enclosing the following responsive documents: 10 letters from Members of Congress; one letter from nine state Attorney Generals; 5 reply letters from the NLRB Acting General Counsel or Acting Deputy General Counsel; and one reply letter from the Division of Operations Management. Deletions have been made in some of the enclosed documents pursuant to the policies embodied in Exemption 6 of the Freedom of Information Act, since disclosure of those portions could constitute an unwarranted invasion of privacy.

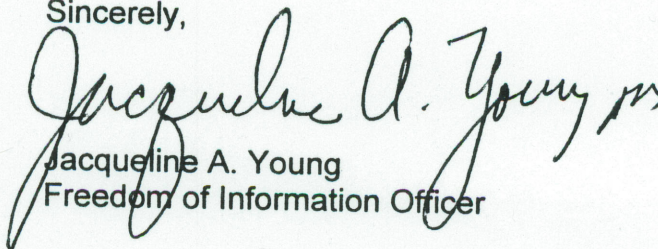
I am withholding, however, notes prepared by the NLRB Acting General Counsel concerning two telephone conversations he had with a member of Congress, pursuant to FOIA Exemptions 5 and 7(A), as discussed above.

The FOIA, 5 U.S.C. § 552(a)(4)(A)(i), provides that each agency shall promulgate regulations specifying the schedule of fees applicable to the processing of FOIA requests. Assumption of financial liability is required in all requests. NLRB Rules and Regulations, Section 102.117(d)(2)(vi). Your request includes no such undertaking. However, because we have already identified and processed the enclosed documents in the course of preparing our response to a subpoena, they are being provided to you at no cost. Please note that in order for us to process any future FOIA requests, you

will need to inform us in writing that you are willing to assume full financial responsibility for any fees associated your request.

The undersigned is responsible for the above determination. You may obtain a review thereof under the provisions of the NLRB's Rules and Regulations, Section 102.117(c)(2)(v), by filing an appeal with the General Counsel, Office of Appeals, National Labor Relations Board, Washington, D.C., 20570, within 28 calendar days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Thus, the appeal must be received by the close of business at 5:00 p.m. (ET) on July 15, 2011. Any appeal should contain a complete statement of the reasons upon which it is based. Questions concerning an appeal of this determination should be directed to the Office of Appeals. For questions concerning this letter, please call our main office at (202) 273-3840.

Sincerely,



Jacqueline A. Young
Freedom of Information Officer

Enclosure

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